

OFFICE OF ATTORNEY GENERAL
1955
April 8
Edward R. Thornton, Commissioner
Public Utilities Commission
State House Annex
Concord, New Hampshire

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CONCORD, N.H.

Dear Sir:

This is in response to your letter of March 30, 1955. Your questions and our answers are as follows:

- "1. As to whether or not the navigation fund, from which these activities are financed, would have any financial liability arising from an accident involving one of these inspectors, while in the course of their duties, either while they were operating State-owned equipment, while they were operating their own equipment, or while operating rented equipment."

It is believed that this question runs to the matter of liability with respect to injured or damaged third persons, and not to an injured inspector. The opportunity is taken, however, to point out that if the inspector is injured in the course of his employment, the navigation fund will be charged with benefits which may be allowed him by the Governor and Counsel under R.L., c. 216. See ss. 4 and 5.

It is well established that the State is not liable in tort. Suit will not lie against the State; and hence no judgment can be obtained in judicial proceedings which will affect the navigation fund. You will be aware of the fact, however, that the State's non-liability will not preclude a grant of compensation by the Legislature to an injured person as a matter of grace, such grant being made a charge upon the navigation fund.

- "2. Furthermore, will you advise us if, following an accident while pursuing their duties, they were sued by an injured party, whether the State would furnish them with legal counsel to defend themselves."

Edward R. Thornton, Commissioner

-2-

There is no authority for the expenditure of public funds in the protection of the estate of a private citizen. There is nothing in the contract or relationship between the State and its employees which changes this rule. Nor, finally, does the fact that the individual committed the wrong complained of while in the employ of the State alter the result. You are advised, then, that the State would not supply counsel for the defense of the individual in his private capacity and with respect to his private estate. A different result would obtain, of course, if the suit while nominally against the employee is actually against the State. See, e.g. Bow v. Plummer, 79 N.H. 23.

- "3. Would you also advise if there is any possibility of liability on the part of the navigation fund, whether or not the expenditure of navigation funds for liability insurance would be a proper one."

The answers to the foregoing questions may make comment on this question unnecessary. Your attention is invited to the policy of the State with respect to insurance insofar as the same has been enunciated. See Laws 1950, c. 5, Part 24, ss. 1 - 5; Laws 1950, c. 5, Part 6, s. 17, subsec. IX. See also Laws 1951, c. 197 amending R.L., c. 329. No specific authority is found authorizing the purchase of insurance with respect to the navigation function, cf. vehicle fleet policies. In the absence of express statutory directive it is not seen that any agency may waive the State's immunity from suit through the purchase of insurance. We advise, therefore, that an expenditure from the navigation fund for the purchase of liability insurance is not authorized.

Very truly yours,

Warren E. Waters
Deputy Attorney General

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